No. 10437

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RICHFIELD OIL CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR THE RICHFIELD OIL CORPORATION, PETITIONER.

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Jurisdiction.

This case is before the court upon petition of Richfield Oil Corporation, a Delaware corporation, pursuant to Section 10 (f) of the Act of Congress of July 5, 1935 (49 Stat. 449, c-362 – 29 USC 151 *et seq.*) known and cited as the National Labor Relations Act, (hereinafter referred to as the "Act"), to review and set aside an order issued by the National Labor Relations Board (hereinafter referred to as the "Board") under Section 10 (c) of the Act.

The jurisdiction of the court is based on Section 10 (f) of the Act, which provides that any person aggrieved by a final order of the Board may obtain a review thereof in

any Circuit Court of Appeals of the United States in the circuit wherein the unfair labor practice was alleged to have been engaged in, or wherein said person resides or transacts business.

Your petitioner is aggrieved by a final order of the Board issued on May 8, 1943 [R. 61-63]. Your petitioner is, and at all times mentioned in said petition has been, a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its home office and principal place of business in the City of Los Angeles, State of California [R. 9; R. 16; R. 27] within the jurisdiction of this court, and it is alleged in the Board's complaint that your petitioner has engaged in an unfair labor practice within the State of California and within the jurisdiction of this court [R. 11; R. 66-67].

Statement of the Case.

The Questions to Be Decided.

This court is being asked in this case to decide whether the Act gives to the Board the power and jurisdiction to deprive an employer of the right (if not the duty) to bargain collectively with the chosen representatives of its employees concerning wages, hours and working conditions affecting such employees by:

1. Injecting itself into the negotiations being carried on in good faith by such employer and the collective bargaining representatives of its employees;

2. Substituting its judgment for that of the employer;

3. Ordering the inclusion in the contract being negotiated of specific provisions, and

4. Enforcing compliance with its will by issuing a blanket injunction against violating any of the provisions of the Act.

The principal reason asserted by the Board for issuing its order is to give union representatives "access" to your petitioner's vessels for the purpose of "collective bargaining" on board such vessels—all this before there is a contract and when there is no one on board your petitioner's vessels who has authority to engage in collective bargaining on behalf of your petitioner.

This court is also being asked in this case to decide whether the Board can, by its own *quasi*-judicial fiat, amend the Act so that the Act will confer upon the complaining unions new and novel rights and privileges neither conferred nor permitted under the Act as enacted by Congress and interpreted by the courts.

Circumstances Immediately Preceding Board Action.

Your petitioner was bargaining with the Sailors' Union of the Pacific and Seafarers' International Union of North American (hereinafter referred to as "complaining unions") for the purpose of entering into a written contract covering wages, hours and working conditions of the unlicensed deck department and unlicensed engine department personnel employed by your petitioner on its tank vessels. These negotiations had progressed steadily and satisfactorily to the point where but two important

provisions in the contract remained unsettled, namely, the provision concerning a closed shop (the so-called "preferential hiring" clause) and a provision concerning the issuance of passes to union representatives.

The parties could not agree concerning these two points and thus a dispute existed which should have been settled by having them certified to the National War Labor Board pursuant to the procedure established by the President's Executive Order 9017 of January 12, 1942.

The Proceedings Before the Board.

At this stage of the collective bargaining and while negotiations were still going on, the complaining unions filed charges under the Act and the Board issued its complaint alleging that your petitioner's refusal to issue passes constituted a violation of Section 8 (1) of the Act. On this bare issue ,namely, whether the failure of your petitioner to agree to the inclusion in the contract then being negotiated of a provision concerning the issuance of passes to representatives of the complaining unions so that they could go on board your petitioner's vessels was an unfair labor practice, a very brief hearing was held and the Board made findings and conclusions which not only went far beyond and outside of the issue raised by the complaint, but which in fact were not supported by substantial evidence. (A summary of the oral testimony appears herein as Part A in the Appendix. A summary of the exhibits introduced appears herein as Part B of the Appendix.) Upon such findings and conclusions the Board entered an all-inclusive order which was not only a blanket injunction against violating the Act but required the issu-

ance of passes without restriction as to number or safeguards of any kind and went still further and ordered your petitioner to publicly admit violations of virtually every provision of the Act, when only a single violation was charged and no violation was proved. (Full text of the Board's order appears herein as Part C of the Appendix.)

Specification of Errors.

[NOTE: The errors herein specified are contained in Specification of Errors in our Petition for Review [R. 83-87] but have been rearranged here to present them, as nearly as possible, in the order in which argument will be presented.

We will indicate the number of each specification appearing in the Petition for Review, as well as the page in the Record where the same appear.]

The petitioner contends that the National Labor Relations Board erred in the following respects:

1. The Board Erred in Not Finding and Concluding That the Subject Matter of the Complaint Was Outside of and Beyond the Jurisdiction and Power of the Board [Spec. 4, R. 84-86, Point I of Argument].

In this connection the Board erred specifically:

(a) In failing to find and conclude that the question of whether passes should be issued is a matter to be determined by collective bargaining [Spec. 4(a) – R. 85], or, should collective bargaining fail, to be

determined under the provisions of Executive Order 9017, of January 12, 1942 [Spec. 3(b) and Spec. 3(c) – R. 84];

(b) In issuing an order which provides specific terms and conditions of employment [Spec. 3(a) – R. 83; Spec. 3(d) –R. 84; and Spec. 4(b) – R. 85];

(c) In ascribing to representatives of unions that have been certified as collective bargaining representatives, duties and functions neither conferred nor permitted by the Act [Spec. 7, R. 86];

(d) In substituting its judgment for the judgment of the employer concerning matters about which there should be collective bargaining between the employer and the bargaining representatives of its employees [Spec. 4(b) – R. 85].

2. Even if the Board Did Have Jurisdiction Over and Power to Consider the Subject Matter of the Complaint Under Some Circumstances, the Board Erred in Not Applying Applicable Principles of Law to the Facts in This Case [Spec. 7, R. 86; Points I and IV of Argument].

In this connection the Board erred specifically:

(a) In going beyond the power and jurisdiction conferred upon it by the Act as interpreted by the several courts of the United States [Spec. 4(c), 4(d) and 4(e), R. 85; Spec. 10, R. 87];

(b) In finding and concluding that the failure to issue passes to union representatives is an unfair

labor practice, within the meaning of the Act [Spec. 6, R. 86];

(c) In finding and concluding that your petitioner by not issuing passes was exercising "domination and control" over the efforts of its employees to engage in "mutual aid and protection" [Spec. 9, R. 87];

(d) In finding and concluding that because other ship owners have granted passes to union representatives that passes are necessary to the enjoyment by employees of benefits conferred upon employees under Section 7 of the Act, and that your petitioner's refusal to issue passes interferes with, restrains and coerces employees in the exercise of such rights [Spec. 8, R. 86].

3. Even if the Board Were Acting Within Its Power and Jurisdiction, and Even if Its Findings and Conclusions Were Supported by Substantial Evidence, the Board's Order Is, Nevertheless, Too Broad, and Therefore Invalid (Point II of Argument).

In this connection the Board erred specifically:

(a) By issuing an order as contained in paragraphs 1 (a) and 2 (a) of the Board's Order [R. 61] without any limitation whatsoever as to the number of passes to be issued, and without affording the employer any protection whatsoever as to the manner of use [Spec. 4(c) and 4(d), R. 85; Spec. 7, R. 86];

(b) By issuing an order as contained in paragraph 1(b) of the Board's Order [R. 62] which, in effect, is a blanket injunction against violating the Act [Spec. 4(d) and 4(e), R. 85];

(c) By issuing an order as contained in paragraph 2(b) of the Board's Order [R. 62] which, in effect, requires your petitioner to publicly admit the commission of violations of the Act of which it was never charged, and concerning which no evidence was introduced to show such violations, or from which such violations could be inferred [Spec. 4(d), 4(e), R. 85].

4. Even if the Board Did Have Jurisdiction Under Certain Circumstances and Had Properly Applied Governing Principles of Law in All Other Respects, the Board, Nevertheless, Erred in That Its Findings and Conclusions, Upon Which the Board's Order Is Predicated, Are Not Supported by Substantial Evidence, and the Evidence Affords No Reasonable Basis Therefor [Spec. 1 and 2, R. 83; Spec. 5, R. 86; Point III of Argument].

SUMMARY OF ARGUMENT.

POINT I.

The Subject Matter of the Complaint Is Outside of and Beyond the Jurisdiction of the Board.

Your petitioner contends that the question of whether or not passes should be issued for the purpose of settling grievances, collecting dues, distributing papers, or for any other reason, or for no reason at all, is solely a question involving terms and conditions of employment to be included or excluded from the contract as the parties may agree. This question, therefore, is a matter about which there should be collective bargaining, and in the event the parties cannot agree and a dispute results, such dispute should be settled pursuant to the provisions of Executive Order 9017, of January 12, 1942 (which is just exactly what happened in this case.)

There has been no charge or proof of a failure to bargain collectively in good faith; of any discrimination whatsoever; or of any improper motive or intent. The *only* charge is that your petitioner refused to issue passes and that it, therefore, was guilty of an unfair labor practice. The sole issue, therefore, is whether it is a violation of the Act for your petitioner in the course of collective bargaining to resist the demands of the complaining unions that a certain clause be included in the contract then being negotiated.

It is your petitioner's contention that the Act does not require any particular term or condition of employment; that the Act does not require your petitioner to agree to

any particular term or condition of employment demanded by the complaining unions, so long as it bargains in good faith concerning the same; that the Board cannot inject itself into the collective bargaining procedure and substitute its judgment for the judgment of the employer concerning the terms and conditions of employment; that the Board cannot destroy your petitioner's right and duty to bargain collectively as required by the Act; that Section 9(a) of the Act does not give selected representatives the exclusive right to settle grievances for employees or the exclusive right to determine how grievances will be settled.

That as will more fully appear in a complete discussion of this point, the Board is ascribing novel functions and duties to unions certified as collective bargaining representatives, which functions and duties are neither conferred nor permitted by the Act.

Your petitioner also contends that in other respects the Board has failed to apply the principles of law which are controlling in this case.

POINT II.

The Board's Order Is Too Broad, and Therefore Contrary to Law.

It is your petitioner's contention that, assuming the Board in all other respects had issued a valid order, and that it had power and jurisdiction to order your petitioner to cease and desist from refusing to issue passes, its order is, nevertheless, invalid because it is so broad and unlimitetd in its scope that it is, in fact, a blanket injunction against violating the Act.

In addition to the foregoing, it is our contention that paragraph 2(b) of the order is invalid because it requires your petitioner to publicly admit violations of the Act of which it was neither charged nor proven guilty. As we have previously pointed out, there is a sole and single issue which is, in fact, a question of law. No other charges were made, and no proof was introduced to prove any other acts, or from which any other acts could be inferred.

POINT III.

The Findings, Conclusions and Order of the Board Are Not Supported by Substantial Evidence.

We contend that the Board's Order is invalid because it is not supported by substantial evidence. and moreover, there is nothing in the evidence providing a reasonable basis for the Board's Order.

We contend that the refusal to issue passes is not an unfair labor practice simply because the unions want the passes to facilitate their business and because union representatives have concluded that grievances cannot be adequately settled without passes. The Board suggests that the only way shown in which grievances can be settled is through the use of passes and indicates that the burden is upon the employer to point out another way [Footnote 15, R. 38]. Apparently the Board is unaware of the reservation in Section 9(a) of the Act, which not only reserves to employees the right to take up grievances directly with the employer but places a duty upon the employer to provide an adequate means of handling grievances. See the opinion of this court in *NLRB v. North American Avia-*

tion, Inc., Case No. 10313, June 24, 1943, 136 Fed. (2d) 898. The Board quite evidently completely disregards the complete and speedy grievance procedure contained in Board's Exhibits 2 (rejected), 3 and 4, which do not contemplate the use of passes.

We think the motive and purpose of the employer in refusing to issue passes is controlling on the question of whether the refusal is an unfair labor practice. Of course, if the intent and purpose of the employer in refusing to issue passes was to interfere with, restrain and coerce its employees in the exercise of rights guaranteed to them under the Act, and its refusal actually did interefere with, restrain and coerce the employees in some right conferred by the Act, the Board would have the power to order the employer to cease and desist from refusing to issue passes just as the Board could order the employer to cease and desist from discriminating against employees for union affiliation, or order the employer to reinstate an employee discharged from union activity, *but in this case there has been no charge or proof of any such intent or purpose.* On the contrary, the only evidence on the point is that the employer adopted the policy of refusing to issue passes to better safeguard its vessels, their crews and cargoes under wartime conditions [Testimony of Mr. Wilder, R. 127, 135, 171; Testimony of Mr. Lamb, R. 386, 390]. The employer introduced documentary evidence to show the reasonableness of such policy [WSA Security Order No. 1, R. 137; WSA Security Order No. 2, R. 138; Wartime Tanker Regulations, R. 152; Wartime Terminal Regulations, R. 156; see also Board's Exhibit No. 7-A, R. 398; and Board's Exhibit No. 7-B, R. 402].

Under the circumstances, we contend that the employer is free to adopt this policy just as the employer would be free to discharge a man "because he has red hair, black hair, or no hair" [to adopt the language of the Trial Examiner, R. 327] without violating the Act unless such policy or discharge results from the employer's intent and purpose to interfere with, restrain and coerce its employees.

POINT IV.

The Cities Service Case, 122 Fed. (2d) 149, C. C. A. 2, Relied Upon Heavily by the Board, Is Not Controlling.

It will be noted that throughout the Intermediate Report the Trial Examiner has continuously referred to the *Cities Service* case; in fact, he has quoted at length therefrom. It is also apparent from the Intermediate Report that the Trial Examiner has made a studied effort to have his findings of fact and conclusions of law in most respects identical with those in the *Cities Service* case.

We contend that the *Cities Service* case was incorrectly decided, and further, that even if there were some merit in that decision at the time it was rendered, the basis therefor no longer exists and, if there is any question about its controlling, the same should be overruled.

ARGUMENT.

POINT I.

The Subject Matter of the Complaint Is Outside of and Beyond the Power and Jurisdiction of the Board.

As to the Subject Matter of the Complaint.

The pleadings frame the issue and the issue thus framed must control the result in a proceeding. The complaint alleges [R. 11] and your petitioner admits [R. 17] that it has refused to accede to the demands of the complaining unions for passes to permit union representatives to go aboard your petitioner's vessels. The complaint alleges [R. 11] but your petitioner denies [R. 17] that such refusal interferes with, restrains and coerces your petitioner's employees in the exercise of rights guaranteed by Section 7 of the Act.

No other charge is contained in the complaint. Therefore, no other issue exists. Under the circumstances there is no question of any discrimination on the part of your petitioner. There is no question as to whether or not your petitioner had been bargaining in good faith. If there were any such question, the evidence clearly shows [Board's Exhibit 5, R. 335-338] that your petitioner had been bargaining in good faith. There is no question of the motive or intent on the part of your petitioner in refusing to issue passes. Indeed, if there were any such question, the evidence clearly shows [R. 127, 151, 153] that your petitioner's refusal was for the sole purpose of better safeguarding its vessels, their crews and cargoes in furtherance of the war effort, which certainly could not be considered an unfair labor practice.

At the time charges were filed, your petitoner was negotiating a contract with the complaining unions through the procedure established by the Act, namely, through collective bargaining. The negotiations had progressed steadily and satisfactorily and to the point where but two principal issues remained unsettled, namely, the question of whether the contract should contain a closed shop provision and whether or not the contract should contain a pass provision. The parties could not agree upon this and a dispute resulted subject to being settled through the procedure established by the President's Executive Order 9017 of January 12, 1942.

It is obvious, therefore, that the subject matter of the complaint is but a single issue, namely, whether as a matter of law your petitioner's refusal to accede to the union's demand that the contract provide for the issuance of passes interferes with, restrains and coerces your petitioner's employees in the exercise of rights guaranteed them in section 7 of the Act, *when such refusal is without discrimination, and it is neither charged nor even attempted to be proved that there was any anti-labor purpose or motive behind the refusal or that your petitioner had not at all times carried on negotiations in good faith.*

As to the Power and Jurisdiction of the Board.

The power and jurisdiction conferred upon the Board and invoked in this case is found in Section 10 (a) of the Act which provides that "The Board is empowered, * * * to prevent any person from engaging in any unfair labor practice (listed in Section 8) * * *." [See Part D of Appendix for complete text of Sections 7, 8, 9 and 10.] The remaining subsections of Section 10

provide the mechanics or procedure for carrying out the Board's power and are not pertinent here except that it should be noted that under subsection (c) the Board is required to dismiss a complaint where it is found that an unfair labor practice was not committed.

The bare allegation in the complaint is that your petitioner's refusal to issue passes interferes with, restrains and coerces its employees "in the exercise of rights guaranteed in Section 7." Admittedly, if your petitioner was performing an act (which it ordinarily would have the right to do) with the intent and purpose of interfering with, restraining and coercing its employees in some right which *they* possess under the Act, the Board would have jurisdiction and power to prevent it, but the complaint does not charge any such intent or purpose.

It is important, therefore, that we determine just what are the requirements of the Act to see what duties it imposes upon the employer and to see just what rights have been conferred upon the employees and the complaining unions by the Act.

As to the Requirements of the Act.

The Act does not require that your petitioner issue passes against its better judgment or its wishes for it is well settled that the Act does not compel an agreement between the employer and the bargaining agents of its employes concerning any particular term or condition of employment. Indeed, it does not compel any agreement whatsoever. See *NLRB v. Jones & Laughlin Steel Corporation,* 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893, 108 A. L.

R. 1352 (1937), wherein the Court stated, beginning on page 45:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' * * *. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion * * *."

This court in its decision in *NLRB v. Union Pacific Stages, Inc.*, 99 Fed. (2d) 153 (C. C. A. 9), 1938, followed the above quoted section in the *Jones & Laughlin Steel Corporation* case.

See also:

NLRB v. Biles Coleman Lumber Co., C. C. A. 9, 98 Fed. (2d) 18, 22;

NLRB v. P. Lorillard Co., C. C. A. 6, 117 Fed. (2d) 921, 923, 924;

NLRB v. Boss Mfg. Co., C. C. A. 7, 118 Fed. (2d) 187, 189.

The Board is a public agency created to administer the Act and it is not a tribunal created for the purpose of enforcing claimed private rights by means of administrative remedies, and the unlawful labor practices against which

the Board may issue a cease and desist order under the Act are strictly limited to those enumerated in Section 8 of the Act.

See:

Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261; 84 L. ed. 738; 60 S. Ct. Rep. 561;

Phelps Dodge Corp. v. NLRB, 313 U. S. 177; 85 L. ed. 1271; 61 S. Ct. 845; 133 A. L. R. 1217.

Now it is well settled that an employer may hire or discharge an employee for any reason not proscribed by Section 8 of the Act.*NLRB v. Jones & Laughlin Steel Corporation, supra.* Even the Trial Examiner agrees with that proposition for he stated [R. 327] that: "you can fire a man because he has red hair, black hair, or no hair." The only question is whether the hiring or discharging was for a reason or purpose proscribed by the Act. This same principle applies equally to other terms or conditons of employment and it has been expressly so held. (*Singer Mfg. Co. v. NLRB,* 119 Fed. (2d) 131 (C. C. A. 7) Mar. 21, 1941 (Cert. den. 313 U. S. 595); 85 L. ed. 1549; 61 S. Ct. 1119; rehearing denied 314 U. S. 708; 86 L. ed. 565; 62 S. Ct. 55.)

In the *Singer Mfg. Co.* case, *supra,* at page 136, the court held that the refusal of the employer to agree to Article III (concerning hours), Article V and Article VI (concerning grievances, strikes and lockouts), and Article VII (concerning the term of the agreement), as well as other provisions, was not in violation of the Act because the employer did not agree to them, but the employer had

violated the Act because he had failed to bargain in good faith concerning them. On page 138, the court said:

> "Obviously petitioner was not bound to accept any particular provision. *The only question is as to whether its resistance was bona fide*" (Emphasis ours.)

See also:

Cupples Co. Mfgs. v. NLRB, 106 Fed. (2d) 100 (C. C. A. 8) (1939);

American Smelting & Ref. Co. v. NLRB, 126 Fed. (2d) 680 (C. C. A. 8), Mar. 12, 1942.

In the case now before this court, the complaining unions and the petitioner had reached substantial agreement concerning hours of work, grievance procedure, payment of overtime in port, payment of overtime for handling lines on the dock, the amount and quality of table service and bed linen which petitioner was to furnish its employees, and many other matters. The parties had not agreed on two matters, namely, the question of passes and the question of a closed shop. The complaining unions were not content to permit settlement of these two disputes through the procedure set up under the President's Executive Order 9017, but, while negotiations were still in progress, filed charges with the Board alleging that your petitioner's refusal to issue passes was an unfair labor practice. Upon such charges the Board issued its complaint *but did not allege any failure to bargain or in any way raise the question of whether your petitioner's resistance was bona fide.*

The complaint was on the theory that the bare refusal in and of itself was an unfair labor practice. As was clearly stated in the *Singer* case, your petitioner had a per-

fect right to resist the inclusion in the contract of a pass provision and the only question should have been whether your petitioner's resistance was *bona fide*. That question is not raised by the complaint and the Board made no attempt to prove that point.

Indeed, the only evidence on the point sustains your petitioner's contentions and is specifically to the effect that the sole reason for refusing to issue passes was to better safeguard the vessels, their crews and cargoes under wartime conditions.

By its action in this case, the Board has injected itself into the collective bargaining procedure; it has substituted its judgment for that of your petitioner, and is granting to union representatives "access" to your petitioner's vessels for the purpose of "collective bargaining" on board such vessels when the contract was being negotiated ashore and when there is no one on board such vessels who has authority to negotiate on behalf of your petitioner. The Board is holding that the Act confers upon bargaining agents the right and privilege of deciding how grievances shall be settled, how, in fact, and where "collective bargaining" shall be conducted, and what terms and conditions of employment your petitioner must agree to. Moreover, the Board is lending itself and its processes to the complaining unions for the purpose of enforcing these claimed private rights by means of administrative remedies. These things the courts will not permit the Board to do.

Amalgamated Utility Workers v. Consolidated Edison Co., supra;

N. L. R. B. v. Jones & Laughlin Steel Corporation, supra;

N. L. R. B. v. Union Pacific States, supra;

Singer Mfg. Co. v. NLRB, supra.

As to the Rights Conferred by the Act.

So that there may be no doubt that this pass issue is a dispute over a term or condition of employment and not an unfair labor practice, let us examine carefully the rights guaranteed under section 7 which reads as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

These rights are divided into three general categories—first, the employees have the right "to self-organization, to form, joint, or assist labor organizations." Clearly, the rights falling in this category are not involved in the action now before the Court. The employees have joined the complaining unions, the complaining unions have been certified as collective bargaining agencies, and your petitioner has been negotiating with them in good faith. Furthermore, the Board has expressly held in its decision and order that passes need not be issued for the purpose of solicitation of membership, and the Board has not ordered the issuance of passes on the theory of any assistance to the labor organizations.

Second, employees have the right "to bargain collectively through representatives of their own choosing." In relation to the employees' rights in this category, the complaining unions have been certified as bargaining agencies, and your petitioner has been bargaining in good faith with the complaining unions.

The bargaining agent's first duty is to negotiate an agreement with the employer on behalf of the employee

and *until that is done, it has no other duty and it has no other functions conferred by the Act.* Until an agreement is reached, there are no "grievances" but only matters about which there shall be collective bargaining. Obviously, passes cannot be of any assistance for the purpose of collective bargaining as such, for it is plain common sense that they do not need passes to negotiate an agreement for there is no one on board the ships who has authority to negotiate an agreement. It may be true that after the agreement is reached, the bargaining agent may have some other duties or functions, but only if and to the extent that they are provided for in the agreement.

The Board's order ascribes duties and functions to the unions beyond that of bargaining for an agreement (even before the agreement is reached) and is clearly erroneous for the Act does not delegate to unions the exclusive right to settle grievances or the right to dictate the grievance procedure. Quite to the contrary, the Act expressly reserves to the *employees* the right to settle grievances directly with the employer. This Court in its decision in *NLRB v. Union Pacific Stages, Inc., supra,* at page 164, in rejecting the union attorney's view that the employer was deprived of the right of settling grievances directly with employees, held:

> "Section 9(a) of the Act, 29 U. S. C. A. Sec. 159(a), contains the proviso that 'any individual employee or a group of employees shall have the right at any time to present grievances to their employer.' Thus the Act does not inhibit adjustment of individual grievances directly between employee and employer *and such procedure is entirely consistent with collective bargaining in matters affecting employees as a class.*" (Emphasis ours.)

The foregoing expressions of this court find support in *NLRB v. Jones & Laughlin Steel Corporation, supra.*

In the case now before the Court, the Board used the same reasoning that was condemned by this Court in *National Labor Relations Board v. North American Aviation, Inc.,* Case No. 10313, June 24, 1943, 136 Fed. (2d) 898. In the *North American* case the Board held that the furnishing by the employer of a means of settling grievances directly with employees was interfering with the *rights and duties of* union representatives as collective bargaining agents, reasoning that "collective bargaining" is not complete upon the execution of the contract negotiated, but continues in the form of bargaining concerning grievances under the contract. The Board also reasons that if an employer "bargains" directly with an employee concerning a grievance, such action by the employer is a refusal to bargain with the chosen bargaining representatives of the employees and therefore an unfair labor practice.

In this case the Board is ascribing the same *rights and duties* to the union representatives, reasoning that "collective bargaining" agents have the right and duty under the Act to bargain concerning settlement of individual grievances because grievances normally concern terms and conditions of employment and these bargaining agents are the exclusive bargaining agents concerning terms and conditions of employment. This reasoning closely parallels the reasoning of the Board in the *North American* case, but it is more objectionable because it does not stop there, for the Board in this case reasons that the unions have the exclusive right to say what procedure will be followed

in settling individual grievances and holds that any resistance by the employer to the demands of the unions concerning such procedure during collective bargaining concerning an over-all contract, constitutes a violation of the Act.

We submit that in both cases the Board has totally disregarded the usual connotation of "collective bargaining" as well as the fundamental difference between bargaining collectively concerning the terms and conditions of work as affecting all employees in an appropriate unit and the presentation and settlement of individual grievances under the contract arrived at by collective bargaining, which is really not collective bargaining at all.

The usual and accepted meaning of "collective bargaining" as set out in Webster's Dictionary is as follows:

> "Negotiation for the settlement of the terms (for example, as to wages) of a labor contract between an employer or group of employers on one side and an organized body of workers on the other."

Webster's Dictionary defines a "grievance" as:

> "The cause of uneasiness and complaint; the wrong done and suffered."

and defines the word "present" as follows:

> " 'Present' means 'to lay before a judge, magistrate, or governing body for action or consideration; submit, as a petitioner, remonstrance, etc., for a decision or settlement to the proper authorities.' "

The fundamental purpose of the Act is to promote industrial peace. To hold that the unions have the exclusive right to determine how grievances shall be settled or the

right to insist that they alone settle grievances for employees would not promote industrial peace, but would be clearly contrary to the intent of Congress (see section 9(a) of the Act) as well as contrary to the decision of the Supreme Court of the United States and of this Court to which we have just referred, for such a holding would destroy the employer's right and duty to bargain and would destroy the *employees'* rights protected by this Court in the *North American* case, *supra.*

Our view finds support in the National War Labor Board decision on March 23, 1943, in *Art Metal Const. Co. and International Federation of Technical Engineers, Architects and Draftsmen Union Local No. 64 AFL,* Case No. 395 (3/23/43), wherein the National War Labor Board stated:

> "The union demanded that employees be permitted to take up grievances in the first instance only through union representatives, since, it claimed, employees inexperienced in collective bargaining might agree to things counter to their own interest.
>
> *"The unions demand is denied not only because of its doubtful propriety under the National Labor Relations Act but because it believed that, if the individuals concerned can resolve complaints between themselves, the summoning of another person only complicates the issue."* (Italics ours.)

We contend that the poistion which we have asserted herein is entirely consistent with the right "to bargain collectively through representatives of their own choosing" and that it is not an unfair labor practice.

Third, employees have the right to "engage in concerted activities, for the purpose of collective bargaining and other mutual aid and protection." This category of

rights belongs to employees as among and between themselves without interference by anyone, even by labor organizations or the Board. If a labor organization has any functions at all in respect of the rights of employees under this category, it is a function that must necessarily be derived from the agreement arrived at through collective bargaining. The Board's order in this case, therefore, directs the issuance of passes for purposes entirely outside the scope of collective bargaining and outside the scope of any agreement arrived at by collective bargaining. By its order, under the circumstances, the Board is dictating terms or conditions of employment, and, as we have seen, the Board does not have the power or jurisdiction to do that.

The purpose of Section 7 of the Act is to enable employees to organize, to enhance their position in collective bargaining concerning terms and conditions of employment, and to engage in concerted activities for their mutual aid and protection, and to further collective bargaining. Thus, employees may assert any demands, rights or privileges which they deem appropriate in the course of their collective bargaining and to use their collective strength to that end. It does not guarantee them specific terms or conditions of employment. It does not guarantee them any particular rate of wage or any particular right of privilege incident to their employment, and it certainly does not grant to the Board or the complaining unions the right to determine by unilateral action what terms and conditions of employment your petitioner must agree to.

It follows therefore that the subject matter of the complaint is a dispute (not involving any discrimination or anti-union activity or motive, and not involving a refusal to bargain in good faith) over which the Board has no power or jurisdiction, and being the only issue before the Board, its order is invalid and should be set aside.

POINT II.

The Board's Order Is Too Broad, and Therefore Contrary to Law.

Assuming for the purpose of argument that the Board has the power and jurisdiction to order your petitioner to cease and desist from refusing to issue passes, its order is, nevertheless, invalid for the following reasons:

1. Board's Order numbered 1 [(a) and (b)] is too broad and, in fact, amounts to a blanket injunction against violating the Act.

There have been many cases on the question of whether, after finding a specific violation of the Act and entering a cease and desist order concerning that particular violation, the Board may also enter an order to cease and desist from violating the Act generally. The rule on this question was definitely established in *National Labor Relations Board v. Express Publishing Co.,* 312 U. S. 426; 85 L. Ed. 930; 61 Sup. Ct. Rep. 693, 1941, wherein the court laid down the general principles recited in its headnotes as follows:

Headnote 4.

> "An employer's violation of the provisions of the National Labor Relations Act in one respect does not justify the making of a blanket order restraining the employer from violating the statute in any manner whatsoever, where other unlawful practices are not found to have been pursued or to be related to the proven unlawful conduct."

Headnote 5.

> "A cease and desist order of the National Labor Relations Board which, when judicially construed, the

courts may be called upon to enforce by contempt proceedings, must, like the injunction order of the court, state with reasonable specificity the acts which the employer is to do or refrain from doing."

Headnote 6.

"While a Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past, the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

Following the *Express Publishing Co.* case, *supra,* two supplemental rules were developed in the cases, the first to the effect that where there has been persistent attempts by the employer by varying methods to interfere with the rights of self-organization, collective bargaining, etc., the Board is justified in following its primary cease and desist order with an order against other like or related acts.

American Enka Corporation v. N. L. R. B., 119 Fed. (2d) 60; C. C. A. 4 (Apr. 7, 1941);

N. L. R. B. v. Entwistle Mfg. Co., 120 Fed. (2d) 532; C. C. A. 4th (June 10, 1941);

N. L. R. B. v. Reynolds Wire Co., 121 Fed. (2d) 627; C. C. A. 7th (June 12, 1941);

F. W. Woolworth Co. v. N. L. R. B., 121 Fed. (2d) 658; C. C. A. (2d) (July 2, 1941);

Sperry Gyroscope Co., Inc. v. National Labor Relations Board, 129 Fed. (2d) 922; C. C. A. (2d) (July 3, 1942);

National Labor Relations Board v. Bradley Lumber Co., 128 Fed. (2d) 768; C. C. A 8th (June 26, 1942);

Rapid Roller Co. v. National Labor Relations Board, 126 Fed. (2d) 452; C. C. A. 7th (Feb. 2, 1942);

National Labor Relations Board v. Aintree Corporation, 132 Fed. (2d) 469; C. C. A. 7th (Nov. 12, 1942);

National Labor Relations Board v. Baldwin Locomotive Works, 128 Fed. (2d) 39; C. C. A. 3rd (March 23, 1942).

Clearly, under the facts of this case, this principle is inapplicable.

The second principle, and the one controlling in this case, is that where the Board finds only an isolated violation of the Act there is no justification whatsoever and it would be improper to issue an order to cease and desist from violating the Act generally or cease and desist from engaging in like or related unlawful acts for the reason that the order of the Board, like an injunction of the court, must state with reasonable certainty the acts which the respondent is to do or refrain from doing.

Aluminum Ore Co. v. National Labor Relations Board, 131 Fed. (2d) 485 (C. C. A. 7);

Press Co., Inc. v. N. L. R. B., 118 Fed. (2d) 937, U. S. Ct. of Appeals for Dist. of Col. (Dec. 9, 1940);

N. L. R. B. v. West Texas Utilities Co., 119 Fed. (2d) 683; C. C. A. 5th (May 2, 1941);

Warehouseman's Union, Local 117, etc. v. N. L. R. B., 121 Fed. (2d) 84, U. S. Ct. of Appeals for Dist. of Columbia (May 5, 1941);

N. L. R. B. v. Continental Oil Co., 121 Fed. (2d) 120; C. C. A. 10th (June 23, 1941);

N. L. R. B. v. Calumet Steel Division of Borg-Warner Corporation, 121 Fed. (2d) 366, C. C. A. 7th (June 12, 1941);

N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, et al., 122 Fed. (2d) 368; C. C. A. 9th (July 21, 1941);

Wilson & Co., Inc. v. N.L .R. B., 123 Fed. (2d) 411; C. C. A. 8th (Nov. 29, 1941);

N. L. R. B. v. Burry Biscuit Corporation, 123 Fed. 540, C. C. A. 7th (Nov. 26, 1941);

N. L. R. B. v. Swift & Co., 129 Fed. (2d) 222, C. C. A. Eighth Circuit (July 10, 1942);

N. L. R. B. v. Cleveland-Cliffs Iron Co., 133 Fed. (2d) 295, C. C. A. 6th, Feb. 11, 1943;

Canyon Corporation v. N. L. R. B., 128 Fed. (2d) 953, C. C. A. 8th, June 30, 1942;

American Smelting & Refining Co. v. N. L. R. B., 126 Fed. (2d) 680; C. C. A. 8th, Mar. 12, 1942;

National Labor Relations Board v. Mason Mfg. Co., 126 Fed. (2d) 810, C. C. A. 9th, Feb. 13, 1942.

It will be noted that the Circuit Court for the Ninth Circuit in *National Labor Relations Board v. Mason Mfg. Co.,* 126 Fed. (2d) 810, C. C. A. 9th Circuit has recognized the above principle and went further to declare that there should be great care exercised in entering general cease and desist decree, broader than warranted

by the evidence, the court citing the *Express Publishing Company* case, and holding on page 814:

> "The court believes it should exercise great care in entering general cease and desist decrees in such cases as these whereby a single mistaken act on the part of the employer would, on the face of the decree, transfer from the experience, skill and knowledge of the Board future claims of violations of the Act affecting some entirely different labor organization, in an entirely different way, and place their determination in contempt proceedings in the more restricted area of evidence of court procedure."

In this case where there is but a sole issue (in fact, that issue is solely a question of law) and where there has been neither a charge nor any proof that your petitioner did anything but refuse to issue passes, it follows that the provisions of paragraph numbered 1 (b) of the Board's Order are invalid.

2. Order numbered 2 (a) requiring your petitioner to take affirmative action is unlimited in scope.

The evidence shows that the issuance of passes will substantially increase the hazards on board ship. Yet no limitations whatsoever as to the number or use have been included and accordingly not one single safeguard is given. In its decision the Board has totally disregarded the existing law which would require that your petitioner grant passes to other unions demanding them.

In re South Atlantic SS. Co. v. NLRB, 116 F. (2d) 480, C. C. A. 5, 1941;

In re Waterman SS. Co., 309 U. S. 206, 226; 84 L. Ed. 704, 60 Sup. Ct. 493;

In re American-West African Lines, 6 L. R. R. 119,

Moreover, the pass provision in the Associated Oil Company's contract [Board Exhibit 4, R. 285] contains a number of safeguards for the protection of the employer, all of which have been totally disregarded by the Board in its order.

3. Board's Order numbered 2 (b) is invalid because it would require your petitioner to publicly admit of violations of the Act. This Order of the Board would require your petitioner to post notices in conspicuous places on its vessels for a period of at least sixty consecutive days, such notices to state that your petitioner will cease and desist from failure to issue passes *and from engaging in like or related acts or from interfering with or restraining or coercing its employees in the exercise of the right of self-organization, to form, join, and assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.*

We submit that such a posting is outrageous under the facts of this case for it is a public admission that your petitioner has committed all of the acts recited when as a matter of fact the charge covers but an isolated act, which in no way violates the Act. The requiring of such a public announcement is contrary to law.

NLRB v. Eagle Mfg. Co., 99 F. (2d) 930 (C. C. A. 4, Nov. 10, 1938);

NLRB v. A. S. Abell Co., 97 F. (2d) 951 (C. C. A. 4, July 14, 1938);

Virginia Ferry Corp v. NLRB, 101 F. (2d) 103 (C. C. A. 4).

POINT III.

The Findings, Conclusions and Order of the Board Are Not Supported by Substantial Evidence.

THE REQUIREMENTS OF THE ACT.

It is now well settled that "the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive' means supported by substantial evidence" [Sec. 10 (e) and (f) of the Act— See Part D of Appendix for complete text.] *Consolidated Edison Co. v. NLRB,* 305 U. S. 197; 83 L. Ed. 126; 59 S. Ct. 206 (1938). In that case the Supreme Court at page 229 said:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

It is equally well settled that the Court will not enforce a Board's order unless such order is based upon substantial evidence.

Washington, Virginia & Maryland Coach Co. v. NLRB., 301 U. S. 142; 81 L. Ed. 965, 57 S. Ct. 648;

NLRB v. Bell Oil & Gas Co., 91 Fed. (2d) 509; C. C. A. 5 (1937);

Appalachian Electric Power Co. v. NLRB, 93 Fed. (2d) 985; C. C. A. 4 (1938);

NLRB v. Sheboygan Chair Co., 125 Fed. (2d) 436; C. C. A. 7 (1942).

See also:

NLRB v. Virginia E. & P. Co., 314 U. S. 469; 86 L. Ed. 348; 62 S. Ct. 344,

wherein it was held that the court is not required to accept findings that are not free from doubt.

Nor will a court enforce a Board's order when the Trial Examiner has based his statements of fact and conclusions of law on certain portions of the evidence and totally disregarded other material and relevant evidence, particularly where the same is uncontroverted. *NLRB v. Sheboygan Chair Co., supra.*

See also *Peninsular & Occidental S. S. Co. v. NLRB,* 98 Fed. (2d) 411; C. C. A. 5 (1938); Cert. den. 305 U. S. 653; 83 L. Ed. 423; 59 S. Ct. 248, wherein it was held that the Board has wide discretion in administering the Act, but in doing so it must deal fairly with both parties to the controversy; *it is its duty to decide the case before it on all the evidence; and it is not at liberty to rely upon part of the evidence in support of its findings and put aside all other undisputed evidence.* (Emphasis ours.)

Now it is true that Congress intended that the administrative and *quasi*-judicial proceedings before the Board should not be hampered by technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. [Sec. 10 (b) of the Act—See Part D of Appendix for complete text.] However, this assurance of a desirable flexibility in the administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force.

Consoldated Edison Co. v. NLRB, supra.

Since there is nothing in the Act indicating an intention to nullify the rules of evidence prevailing in courts of law or equity, they are controlling in a proceeding in the Circuit Court of Appeals to review and set aside an order of the National Labor Relations Board.

On petition for rehearing in the *Bell Oil & Gas Co.* case (98 Fed. (2d) 870, C. C. A. 5 (1938)), the Court said at page 871:

> "We held in this case that the rules of evidence prevailing in courts of law and equity were not abolished by the National Labor Relations Act, 29 U. S. C. A. Sec. 151 *et seq.* We adhere to this ruling, notwithstanding the provision that, in proceedings before the Board, such rules shall not be controlling. . . . The fact that incompetent evidence is heard does not invalidate an order of the Board, provided the findings upon which the order is based *are supported by competent, relevant, and material evidence.* * * *
>
> "The provision in paragraph (b), section 10, 29 U. S. C. A. Sec. 160 (b) with reference to the rules of evidence prevailing in courts of law and equity not being controlling, *means that it is not error for the Board to hear incompetent evidence. It does not mean that a finding of fact may rest solely upon such evidence. Whether there be any competent evidence to support the findings of the Board is a question of law;* whether it is sufficient is a question of fact. The decision of the Board upon a question of law is not conclusive in this court.
>
> "In one instance, in the case under review, the sole evidence to support an essential finding of the Board was the incompetent evidence quoted in our opinion. In the others, there was no substantial evidence to support essential findings. Therefore, as a matter of law, the order was deemed invalid." (Emphasis ours.)

See also *NLRB v. Lion Shoe Co.*, 1st C. C. A. 1938, 97 Fed. (2d) 448, where it was held that though the Board was not bound by the usual rules of evidence, this did not change the principle requiring reasonable deductions from evidence.

Upon petition to the Circuit Court of Appeals and the filing therein of a transcript of the entire record, the entire nature of the proceeding is changed and becomes wholly judicial and there is nothing in the Act to indicate that the Circuit Court of Appeals should consider irrelevant, immaterial or incompetent evidence in its determination of the question whether the Board's order is supported by substantial evidence, *and irrelevant, immaterial or incompetent or hearsay and non-expert opinion evidence may not be used in the Circuit Court of Appeals as a basis to support the findings of the Board* upon which an order which is sought to be enforced, rests. *NLRB v. Bell Oil & Gas Co., supra.* (Emphasis ours.)

In *NLRB v. Union Pacific Stages, Inc.,* 99 Fed (2d) 153 (C. C. A. 9, 1938, this court at page 177 said:

> "It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10 (e) of the Act, 49 Stat. 453, 29 U. S. C. A. Sec. 160 (e), which provides that 'the findings of the Board, as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings *arrived at by accepting part of the evidence and totally disregarding other convincing evidence.*
>
> " 'We are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. 29 U. S. C. A. Sec. 160 (e) (f); Washington, Virginia & Maryland Coach Co. v. NLRB, 301 U. S. 142, 57 S. Ct. 648, 650, 81 L. Ed. 965. * * *

Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; *and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf.* Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819.' Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir., 93 F. 2d. 985, 989.

" 'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

" '*The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power.* Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought.' National Labor Relations Board v. Thompson Products, Inc., 6 Cir., 97 F. 2d 13, 15." (Emphasis ours.)

The foregoing authorities definitely establish, and we think the rule unquestionably is that the Board is not bound by technical rules of evidence in ascertaining the true facts concerning an issue raised by the pleadings; and that in its consideration of the case it is not error for the

Board to hear incompetent, irrelevant evidence or hearsay evidence. But it is error to base its findings upon such evidence *for the Board's order must be supported by substantial evidence.*

We submit that this is a question of substantive law, for the reason that the Board's order is invalid as a matter of law, unless it is so supported, and the Court on review will be guided by the rules of evidence in determining whether the Board's order is supported by substantial evidence.

The Evidence Does Not Meet the Requirements of the Act.

We will now show wherein the essential findings of the Board are not supported by substantial evidence. For orderly analysis, these are presented in the order in which they appear in the Intermediate Report, and we will give page and line references to the Intermediate Report, page in the printed record, the exceptions, and the page where such exceptions appear in the printed record.

1. *Footnote 3, Page 2 of the Intermediate Report* [R. *27*], *Exception 1.* [*R. 50.*]

Counsel's Opening Statement [R. 106]; Statement of witness Wilder [R. 133]; Respondent's Exhibit 1 [R. 137]; Respondent's Exhibit 2 [R. 138]; Respondent's Exhibit 3 [R. 153]; and Respondent's Exhibit 4 [R. 156, all show that your petitioner's tankers are not being operated as usual. Even if it were not for this evidence, which is directly contrary to the finding, we think the court would take judicial notice that the operation of the petitoner's tankers is now completely regulated in aid of the war effort.

2. *Finding 3-A, Lines 23-33, Page 3 of Intermediate Report [R. 28]— to the Extent That This Finding Does Not Confine "Exclusive Representation" to Matters of "Collective Bargaining" as Such and to the Extent That "the Sole Question in This Case" Is Not Confined Strictly to a Matter of Law. [Exception 2, R. 50.]*

Paragraph 5 of the Complaint alleges that the complaining unions are the exclusive representatives *for the purpose of collective bargaining.* [R. 10.] This was admitted in the answer. [R. 17.] There is nothing further in the record on this point but the Board did not so limit the finding and, in fact (as more fully appears under Point I) ascribes duties and functions to collective bargaining agents outside of and beyond collective bargaining. This is an essential finding under the Board's theory and it is without any foundation whatsoever. As to the remaining portion of this exception, the finding should be limited strictly to a question of law, for there is no charge in the complaint nor any evidence to show or from which it may be inferred that the employer had any intent or purpose prohibited by the Act when it refused to issue passes. The bare issue, therefore, must necessarily be solely a question of law as to whether the refusal is in and of itself a violation of the Act.

3. *Footnote 4, Page 4 of Intermediate Report [R. 30], Exception 5. [R. 50.]*

Here the Board found that the National Martime Union was not the duly authorized representative of your petitioner's unlicensed seamen when that organization filed charges against your petitioner on February 24, 1942, for

refusal to issue passes to them. On that finding, the Board concludes that your petitioner's contention that the prior decision of the Board should bar the proceedings in this case, is without merit either on the theory of estoppel or *res judicata.*

All of the evidence in the record bearing on the charge of the National Maritime Union and the Board's refusal to issue a complaint because your petitioner was not discriminating concerning passes is contained in Respondent's Exhibits 5-A to 5-E, inclusive [R. 344-354]. This action by the Board is really a conclusion of law that Respondent's Exhibits 5-A to 5-E, inclusive, are without merit for any purpose in this proceeding because the National Maritime Union was not the duly authorized representative of the unlicensed seamen. In this way it has actually excluded evidence which has great probative value by showing that your petitioner's conduct, which the Board now finds to be an unfair labor practice, has previously been approved by the Board.

This finding presupposes that the Act makes it an unfair labor practice to refuse "access" to a certified union when such refusal to a union represnting employees before election of certified representatives is not an unfair labor practice.

4. *Footnote 5 on Page 4 of the Intermediate Report* [*R. 30*], *Exception 6* [*R. 50, 51*].

There is no evidence in the record to show that the word "access" has any meaning in the shipping industry, let alone the definition conceived by the Board.

5. *Lines 15-27, on Page 4 of the Intermediate Report [R. 30-31], Exception 7 [R. 51].*

This entire paragraph is really not a finding but it is a conclusion of the Board arrived at by confused reasoning without basis whatsoever in the record. This erroneous conclusion is the foundation of the Board's theory of this case. We do not find fault with the quoted portions of the Act but the error lies in their application. The Board concludes that because the Act guarantees the right to bargain collectively concerning terms and conditions of work, that the Act also guarantees to collective bargaining representatives the exclusive right to settle grievances because grievances concern terms and conditions of work. Having made this erroneous conclusion, it takes the next step and concludes that *any disagreement by the employer with the demands of the certified union concerning the manner or method of settling grievances is a violation of the Act.*

This is the same theory advanced by the Board in *NLRB v. North American Aviation, Inc.,* Case No. 10313, June 24, 1943, 136 Fed. (2d) 898, wherein this court properly held that the duties and functions of collective bargaining agents are not so broad. We contend that the first duty of collective bargaining agents is to negotiate a contract. When the contract is completed it will determine how grievances shall be settled and it will determine what additional functions, if any, are conferred upon collective bargaining representatives.

The conclusion that a refusal to grant passes is a refusal to bargain is not within the single issue raised by the pleadings and it has no basis whatsoever in the record,

for your petitioner has been in good faith bargaining with the collective bargaining agents. [See Board's Exhibit 5; R. 335.]

6. *Lines 29-36, Page 4 of the Intermediate Report* [*R. 31*], *Exception 7* [*R. 51*].

This is really another conclusion by the Board based on the assumption that collective bargaining agents have the absolute right, conferred by the Act, to settle any and all grievances. This conclusion is erroneous because it is the Act itself, as construed by the courts, that will determine whether your petitioner is guilty of an unfair labor practice—this whole question is a question of law. What is customarily done in another industry and, in fact, by another employer, has no bearing upon your petitioner's conduct. The conduct of the many dry cargo operators and the one tanker company (Tide Water Associated Oil Company) holding written contracts with the unions, is governed by their individual and respective contract arrangements arrived at through collective bargaining processes. If those contracts confer any duties and functions on the complaining unions in addition to the negotiation of an overall contract, those duties and functions must necessarily arise from contract, all of which is wholly immaterial to the issues in this case.

However, if the Board is correct and it is necessary to look to the contracts between the unions and the other operators to determine whether your petitioner is violating the Act, the only possible conclusion would be that your petitioner was not violating the Act. We have set forth in the Appendix a summary of the grievance procedure

provisions contained in Board's Exhibits 2 (rejected), and 3, and the complete text of the grievance procedure in Board's Exhibit 4 [See Part B, pp. 9 to 12 of Appendix]. All of these grievance procedures are identical in that not one of them provides for "access". On the contrary, those contracts which provide for the issuance of passes specifically specify that passes are for the purpose of transacting union business or for visiting members. During contract negotiations, the complaining unions and your petitioner agreed upon the grievance procedure set forth in the Associated Oil Company contract [Board's Exhibit 4 — see Part B, p. 11 of Appendix]. That grievance procedure does not contemplate the presence of shore representatives of the unions and accordingly the evidence shows clearly that there is no need to issue passes.

7. *Lines 38-43 on Page 4, and Lines 1-32 on Page 5 of the Intermediate Report* [*R. 32 and 33*] *Exception No. 8* [*R. 51*].

To the extent that this section of the Intermediate Report refers to stewards, it has no basis whatsoever in the record, and if it did it would be immaterial, for the stewards are not involved in this proceeding and the unions are not representatives of the stewards.

8. *The 4th Paragraph Under B(1) of the Intermediate Report Appearing on Lines 35-45, Inclusive, on Page 5, and Lines 1-19, Inclusive on Page 6 of the Intermediate Report* [*R. 34-35*]*; Exception 9* [*R. 51*].

This finding of fact is immaterial to the issues in this case and therefore not supported by substantial evidence.

9. *Footnote 10 Page 5 of the Intermediate Report* [*R. 34*], *Exception 10* [*R. 51*].

There is no evidence in the record that so-called "access" is confined to any one person in any one port. This finding not only is without basis but it is misleading and tends to throw an improper light on your petitioner's position on the question of issuing passes. The record shows that there are two complaining unions [Board's Exhibit 1-A, R. 1; Board's Exhibit 1-B, R. 3; Board's Exhibit 1-C, R. 5]; and paragraph 5 of the complaint [R. 11]. Each of the complaining unions has demanded at least one pass for each principal port on the Pacific Coast. In addition, the law requires your petitioner to issue passes to all other unions that might demand them if your petitioner issues passes to the complaining unions. See *In re Waterman Steamship Company,* 309 U. S. 206, 226; 84 L. Ed. 704, 60 Sup. Ct. 493; *In re So. Atlantic Steamship Co. v. NLRB,* 116 F. (2d) 480, C. C. A. 5, 1941; *In re American-West African Lines,* 6 L. R. R. 119.

We want to emphasize the length to which the Board has gone in the *American-West African Lines* case just cited. In that case the Board ordered the employer to issue passes to a rival union when the employer had a valid closed shop contract with another union. If the rival union with its passes were able to secure a member among the seamen of that employer, the employer under its contract would have been required to discharge the seaman, but the Board held that the employer could not discriminate on the question of passes.

These cases were cited to the Board, and the employer urged throughout the proceedings that one of its principal objections to the issuance of passes to the complaining unions was that it would be required to issue them to all other unions demanding the same; otherwise, the employer would be guilty of an unfair labor practice, thus permitting many persons to go on board your petitioner's vessels, thereby greatly increasing the hazards to which such vessels are exposed. Therefore, this finding or statement by the Board is misleading to the point of being prejudicial and there is nothing in the record which will support it.

10. *Footnote 11 Page 11, of the Intermediate Report* [*R. 34*], *Exception No. 11* [*R. 52*].

There is no evidence whatsoever in the record that 90% of the grievances reported are disposed of on board by shore representatives of the union. The only evidence concerning the 90% figure was the statement of witness Gries [R. 376] to the effect that *he* has settled 90% of the disputes referred *to him* on board.

11. *Footnote 13, Page 6 of the Intermediate Report* [*R. 35-36*], *Exception 12* [*R. 52*].

This is an immaterial conclusion of the Board and an attempt to conform the findings in this case to the findings in the *Cities Service* case, which we have shown under Point IV hereof to be erroneous. It is immaterial, primarily for the reason that it is outside the scope of the single issue raised by the pleadings.

12. *Lines 1 to 14, Page 7 of the Intermediate Report* [*R. 36-37*], *Exception No. 13* [*R. 52*].

There is no charge in the complaint and no evidence that your petitioner interfered with the right of self-organization, to form, join, or assist a labor organization. The evidence is clearly directly to the contrary for the record shows that the complaining unions are certified as bargaining agents and that at the time charges were filed, your petitioner was bargaining in good faith with such agents for the purpose of entering into a written contract.

13. *Lines 16 to 27, page 7, Intermediate Report* [*R. 37*], *Exception 14* [*R. 52*].

We have shown that there is no evidence to support the finding or conclusion that your petitioner's conduct interfered with collective bargaining. This finding is a repetition which brings in "mutual aid and protection" and is clearly unsupported.

14. *Footnote 14, Page 7 of the Intermediate Report* [*R. 37 and 38*], *Exception 15* [*R. 52*].

This is an inference by the Board which is clearly unsupported by the evidence. The statement of union representatives that they have been in the practice of collecting dues and distributing papers when they were aboard dry cargo vessels under the terms and conditions of passes issued to them pursuant to contract, is immaterial and irrelevant as a basis for inferring that "Pacific Coast Shippers, who grant access" consider these matters "a proper form of aid to be given." Even if "Pacific Coast Shippers" do, it is wholly immaterial. Moreover, the inference

is defective for if the Act guarantees to certified unions the right to collect dues on board so that their members may retain the benefits incident to their membership, clearly the Act also gives the same right to unions not certified but having members on board and, furthermore, it would guarantee to *employees* the right to acquire those same benefits by joining the union. To sustain the Board would be to grant to certified unions privileges not conferred by the Act and discriminate against *employees* who are not members of that particular union.

15. *Footnote 15, Pages 7-8 of the Intermediate Report [R. 38], Exception 16 [R. 52].*

This is really an unwarranted assumption by the Board that there is some duty upon your petitioner to demonstrate some other method of settling grievances than that demanded by the unions. Here again, the Board attempts to conform the findings of fact in this case to those in the *Cities Service* case. This finding is immaterial to the issues in this case and therefore is not supported by substantial evidence.

16. *Lines 29 to 40, Page 7 of the Intermediate Report [R. 38], Exception 17 [R. 52].*

There is not one scintilla of evidence to support this finding or conclusion and the remarks of the Board are clearly intended to throw an improper light upon your petitioner's conduct by reading into the Act the obligation on your petitioner to facilitate the convenience of the complaining unions by acceding to their demands, contrary to the best interest of the petitioner and in its opinion contrary to the best interest of its employees.

17. *Lines 42 to 45, Page 7 of the Intermediate Report [R. 38], Exception 18 [R. 52].*

This is really a conclusion based upon prior findings and conclusions, which, in turn, are not based on substantial evidence and therefore must fall.

18. *Lines 5-8, Page 8 of the Intermediate Report [R. 39, 40], Exception 19 [R. 53].*

There is no evidence to support the finding that your petitioner "does not in fact, contend that under peace time conditions it would be justified in refusing passes to the duly authorized representatives of its unlicensed deck and engine personnel for the purpose of access to its tankers * * *". Your petitioner contends and has contended throughout the entire proceeding that the Act does not require it to issue passes under any circumstances excepting only if its refusal was with the intent and purpose of accomplishing something forbidden by the Act. Your petitioner also contends that the requirement of the Act is that your petitioner bargain collectively in good faith concerning passes. This has been done and your petitioner, therefore, has not violated the Act.

19. *Lines 16-34, Page 8, and Lines 1-3, on Page 9 of the Intermediate Report [R. 40], Exception 20 [R. 53].*

There is nothing in the record to show that those persons who are permitted aboard your petitioner's vessels are not essential to such vessels. Indeed, the evidence is directly contrary. The testimony of Witness Wilder [R. 159-165] shows clearly that only persons having business essential to the operation of the tankers are permitted aboard. The statement that only union representatives

have been denied access finds no support in the evidence. There is, however, evidence directly contrary on this point, for Witness Wilder testified that passes are denied to all persons [R. 127] and Witness Lamb testified to the same effect [R. 385]. The statement that it is almost the usual practice in the "shipping industry" to permit access is immaterial to the issue and ignores the fact that the tanker industry is separate and apart from the shipping industry. Tanker operators are private carriers, transporting their own merchandise between their own terminals. The dry cargo operators are common carriers, transporting merchandise for the general public between various ports of the world. The only evidence on the point is that one or two tanker operators out of the 8 or 9 tanker operators on the Pacific Coast permit access. Clearly that is directly contrary to the inference that it is the universal practice to permit access to tankers. The concluding statement to the effect that your petitioner "is practically alone in its fear of increased hazards from the presence of seamen's representatives on board vessels" is obviously intended to throw improper light on the employer's refusal to issue passes and to discredit its reasons for adopting such policy.

20. *Footnote 16, Page 9, of the Intermediate Report* [*R. 41*], *Exception 21* [*R. 53*].

The finding that the presence of union representatives on board tankers is less hazardous than others and the further statement that the armed guards afford the necessary security in wartime, are wholly without foundation in the evidence. In the first place, the evidence is directly to the contrary for the hazards are measured entirely by the time spent on board [R. 390].

The assumption of the Board that militarized guards provide the needed measure of security is without any foundation in the evidence whatsoever. The function of armed guards is to keep persons off the vessels. Clearly, if persons are on board the vessels, the presence of armed guards does not reduce the hazards. We submit that this bland statement by the Board is absurd. If guards were the answer, why then have the War Shipping Administration and the U. S. Coast Guard and the U. S. Navy and other branches of the Federal Government issued so many regulations, and security orders and undertaken so many precautionary steps. Obviously, it is an unwarranted assumption by one wholly without responsibility, who dismisses as being "without merit", the studied judgment of your petitioner who has had many years of experience in the operation of tank vessels and the handling of dangerous cargoes, and which bears the entire responsibility for the safety of the vessels, their crews and cargoes and for the carrying out of the many security orders and regulations necessary in time of war.

21. *Lines 5-17, of Page 9 of Intermediate Report* [*R. 41, 42*], *Exception 22* [*R. 53*].

Even the Trial Examiner states that your petitioner could issue any order it sees fit so long as it was not with the intent of interfering with any rights of its employees under the Act [R. 327]. There is no charge in the complaint of any such intent and no evidence was introduced concerning it. Therefore, the bald statement that your petitioner's contentions are without merit is wholly unwarranted and without any foundation whatsoever in the record. The Board states "Of utmost significance is the

fact that the Navy and the Coast Guard have provided the representatives of the respondent's unlicensed deck and engine personnel with the proper identification and authority to enter restricted areas and to board tankers and vessels, including respondent's tankers, providing respondent issues its passes to the representatives." We think it is significant that the governmental authorities issue identification cards and badges which on their face show that they are not passes but are only means of identification—and it is indeed significant that they do not permit entrance into restricted areas *without the express permission of the one responsible for the safety of the premises involved.*

The Board then goes on to say that the so-called Statement of Policy of the War Shipping Administration, agreed to by the unions, has stabilized for the duration, collective bargaining contracts which contain provisions for passes for authorized representatives of seamen, thus affording access. The Statement of Policy is Board's Exhibit 7-A [R. 398], but the Board totally disregards the plain and unambiguous language in an interpretation of the Statement of Policy, which interpretation is contained in Board's Exhibit 7-B [R. 402] and provides in effect that paragraph 3 of the Statement of Policy contemplates that *no meetings may be held* on board ship which tend in any way to interfere with operations, and *whether or not they interfere with operations must be left to the judgment of the master,* for "it is thought better in view of war conditions to remedy abuses ashore rather than to have arguments and disputes aboard ship whether a given meeting 'interferes with the ship's operation.' "

22. Footnote 18, Page 9 of the Intermediate Report [R. 42], Exception 23 [R. 53].

The Board's finding that "visitors to piers and vessels should be limited to cases of absolute necessity" [Respondent's Exhibit 1, R. 137; Respondent's Exhibit 2, R. 138; Respondent's Exhibit 3, R. 152; Respondent's Exhibit 4, R. 156], and the finding that "the prohibition of 'crews' mass meetings, crews' committee meetings, and other similar meetings aboard ships' " contained in the Statement of Policy and the interpretation thereof [Board's Exhibit 7-A and 7-B, R. 398-403] do not apply to union representatives "having access to transact business in conformity with the provisions of the Act" begs the question.

Admittedly, if the collective bargaining agreement gives to unions certain duties and functions which require their presence on board, then those representatives will have business on board pertaining to the ship's operation, manning, etc.—but transacting union business is not ship's business—the collection of dues and distributing of union papers is strictly union business and they are visitors on board ship if they are on board for any reason except *ship's business.*

The concluding sentence in this footnote, to the effect that your petitioner has admitted that no governmental officer has ever interpreted these regulations as excluding union representatives from ship's business is correct so far as it goes, but is incomplete and very misleading. Your petitioner stipulated "we have never received instructions from any governmental organization, that is, any governmental branch that we were prohibited from issuing

passes, nor have we been told that we could issue passes, nor have we been told that we could not issue passes to labor representatives or anyone else" [R. 172]. We contend that the responsibility is upon your petitioner to carry out the rules and regulations issued. If, in its opinion or the opinion of its masters, all persons should be excluded from the vessels, that ends the matter so long as that decision is not for the purpose of accomplishing something forbidden by the Act. We think that this is also the view of the War Shipping Administration. Board's Exhibit 7-B, [R. 402-403] provides specifically that whether a particular meeting on board a ship in any way interferes with operations is something which the master must judge. This evidence, therefore, is contrary to the findings of the Board.

There is a comment that should be made at this point. The Board has made a point that existing agreements were supposed to have been "frozen" and that such agreements contained pass provisions and supposedly the pass provisions were also frozen. That, however, is not the case as will be apparent from a reading of Exhibit 7-B in connection with Exhibit 7-A. The agreements were frozen *as modified by eliminating the various meetings on board ship.* These two exhibits introduced by the Board itself, taken alone, are sufficient to destroy any possible foundation in the evidence to support the Board's order.

23. *Lines 19-20, Page 9 of the Intermediate Report* [*R. 42*], *Exception 24* [*R. 53-54*].

It is submitted that the only reasons in the record for refusing to issue passes are the very reasons which the Board says it does not believe to be valid. We cannot help what the Board believes concerning evidence supporting our contentions but we think that it has become very apparent by this time that the Trial Examiner and the Board believe only what they consider to be in support of the unions' demands and that they disbelieve everything that supports your petitioner's contentions or which might defeat the unions' demands, regardless of the evidence or information. In short, the Trial Examiner is prejudiced.

24. *Footnote 18, Page 9 of Intermediate Report* [*R. 42*], *Exception 25* [*R. 54*].

We thoroughly agree that the wartime safety laws and duties and obligations of the master are not at variance with the rights of employees to exercise their privileges under the Act. Taken literally, this finding is in accordance with the law. However, again the Board begs the question. There is no evidence whatsoever that the privileges conferred under the Act are in any way restricted. The question is whether the duties and functions which the Board ascribes to collective bargaining representatives are conferred by the Act, and the answer to that is an emphatic "no."

25. *Lines 25-35, Page 9 of the Intermediate Report, and Lines 1-17 on Page 10 of the Intermediate Report [R. 43-44], Exception Nos. 26 and 27 [R. 54].*

These are entitled "Concluding Findings" and clearly represent a restatement in summary form of prior findings and conclusions. Just as prior findings are not supported by substantial evidence, these findings are likewise unsupported by substantial evidence and specific treatment of these summary findings would be a duplication. This whole finding may be summed up by saying that the Board finds that your petitioner's conduct violated Section 8 (1) of the Act by preventing its employees from bargaining collectively concerning grievances and by preventing their enjoyment of essential rights guaranteed by the Act.

26. *Finding of Fact No. IV on Page 10 of the Intermediate Report [R. 44], Exception 28 [R. 54].*

Finding that the conduct of your petitioner will lead to labor disputes, burdening and obstructing commerce, is based on a prior finding that your petitioner's conduct was an unfair labor practice, which we have shown is not supported by substantial evidence and clearly this finding is likewise not supported by substantial evidence.

27. *Paragraphs 1 and 2, Finding V, Entitled "The Remedy," Page 10 of the Intermediate Report [R. 44-45], Exceptions 29 and 30 [R. 54].*

This is in some respects a repetition of prior findings and it also includes what the Board conceives to be the necessary remedy. Being based on prior findings which are not based on substantial evidence, this finding is likewise not based on substantial evidence.

28. *The Last Sentence in the Third Paragraph of Finding V Entitled "The Remedy," on Page 10 of the Intermediate Report* [*R. 45*], *Exception 31* [*R. 54*].

Throughout the case, your petitioner urged that the law as established by the courts and the Board, would require your petitioner to issue passes to all unions demanding them if your petitioner is required to issue passes to the complaining unions. The Board here rejects any consideration of this contention by the simple expedient of finding that there is no jurisdictional question involved in this proceeding. Thus, the Board totally disregards uncontroverted evidence upon this point and the Board is not at liberty to disregard such evidence in the determination of this case.

29. *Conclusion of Law Numbers 3 and 4 Appearing on Page 11 of the Intermediate Report* [*R. 46*], *Exception 32* [*R. 55*].

These are erroneous conclusions of law based on findings of fact which we have shown to be unsupported by substantial evidence.

POINT IV.

The Case of Cities Service Oil Company et al., 122 Fed. (2d) 149, C. C. A. 2 (1941), Relied Upon by the Board, Is Not Controlling in This Case.

The Trial Examiner in his Intermediate Report quoted at length from the *Cities Service* case, and the Board adopted the Intermediate Report in its entirety. It is quite evident, therefore, that the Board is relying heavily upon this case as being controlling herein.

For the reasons set forth in Point I hereof the Court in the *Cities Service* case enforced an order of the Board concerning a matter beyond the power and jurisdiction of the Board. Therefore, the Court's decision in that case was erroneous in its entirety.

In the *Cities Service* case the Court expressly found that in that case there was substantial evidence to support the Board's order. In Point III hereof we have shown that the Board's order in this case is not supported by substantial evidence. Therefore, even if the *Cities Service* case were not erroneous in its entirety, it is not controlling herein.

In addition to the foregoing, the case now before this Court involves an order of the Board which goes far beyond the order as enforced in the *Cities Service* case. If that case is controlling in any respect, its limitations are likewise controlling. The Board has attempted to circumvent the restrictions in the *Cities Service* case by making finds in this case that were not made in the *Cities Service* case, but the several findings to which we have

just referred, are not supported by substantial evidence. The *Cities Service* case was decided on July 25, 1941, upon facts arising long before the war and, in fact, long before the grave tanker shortage which manifested itself shortly before the war. Assuming, for the sake of argument, that the Court might have been justified in its holding under the circumstances of that case at the time the decision was rendered, there is no justification now under wartime conditions and the changed circumstances. At the time of the *Cities Service* case there was no way to settle a dispute over a term or condition of employment if the employer and the bargaining union persisted in their refusal to agree concerning a particular matter under negotiation. No doubt that situation was a vital consideration by the Court; however, that condition no longer exists. The National War Labor Board is now expressly empowered to dispose of disputes of that nature and there no longer can be any justification for the Board to assert its jurisdiction for expediency in settling such disputes, and there can be no justification for a court to enforce such an order.

Conclusion.

It is evident from the foregoing that the Board has been most arbitrary in this case. The Board has made a studied effort to enlarge upon its jurisdiction through its own fiat concerning matters heretofore held to be outside its jurisdiction and beyond its power by the several courts of the United States, including the Supreme Court of the United States and this Court.

Under the circumstances your petitioner has truly been aggrieved within the meaning of the Act and we are confident that this Honorable Court will not tolerate such arbitrary, unreasonable and capricious conduct by the Board.

Wherefore, your petitioner respectfully prays that this Court set aside the Board's order, with direction that the complaint issued by the Board be dismissed.

Respectfully submitted,

DAVID GUNTERT,
Attorney for Petitioner.

APPENDIX.

PART A.

Summary of Testimony.

Waldo Hammond Wilder, called as witness for the Board, testified substantially as follows: That he is port captain [R. 108] for Richfield Oil Corporation; that his duties consist of dispatching and inspecting vessels, maintaining crews and supplies on the six ocean going tankers operated by Richfield Oil Corporation [R. 109]; that under ordinary circumstances, these vessels are at sea for several days [R. 110] and may call at any port on the Pacific Coast [R. 111]; that Richfield Oil Corporation maintains terminals at Seattle, 2 to 2½ miles from the town proper [R. 112]; at Linnton, Oregon, 6 miles north of Portland [R. 112], at Point Richmond [R. 112] and Long Beach [R. 113]; that these vessels have docked at terminals operated by other companies [R. 111] and have docked at Oleum and Avon [R. 113]: that loading operations take from 12-48 hours [R. 113], but average 12-15 hours [R. 114]; that discharging operations take from 20-48 hours [R. 115] but vessels are in port several hours longer than the actual loading and discharging operations [R. 114, 115]; that sometimes vessels will discharge and then load at the same dock; that it is difficult to say just how long the average time in port would be [R. 114-115]; that recently, one of Richfield's tankers was in port for 56 hours [R. 124].

That vessels carry a crew of 36 to 40 [R. 116], of which about 10 are unlicensed deck personnel and 8 or 9 unlicensed engine department personnel [R. 116]; that in port, unlicensed deck personnel stand hose and tank top

watch, and sometimes handle small amount of stores [R. 117]; that when available, work parties handle stores [R. 119]; that about one-third of the unlicensed deck and engine personnel (exclusive of wipers) would be required to be on board during loading and discharging operations [R. 118]; that when men are not on watch, they are free to go ashore when off duty; that sometimes when standby crews are available, the company hires them to relieve the regular crew—sometimes men do not come back for their watches and it is necessary to hire others [R. 121]; that a seaman need not get permission to go ashore if he is off watch [R. 121]; that the company prefers that the men leave the ship when not on duty because the fewer men on board, the safer the ship down to enough to move her in emergency [R. 118]; that the men do not have to be encouraged to go ashore, for, when the vessel arrives, the men off duty "just pile off" [R. 126]; that sometimes it is difficult to keep them long enough to deliver their mail [R. 126]; that practically all of the time off duty is spent ashore [R. 144]; that watches are arranged in two sets of four hours per day; that is, four hours on watch and 8 hours off watch [R. 121]; that sometimes in handling certain cargoes, the men are not fed on board, but instead are given meal allowances and they eat ashore [R. 121]; that the men are paid every 30 days but are allowed to draw money as needed, sometimes as often as two or three times a day, and there is a large turnover of men since the shipbuilding program and the bonus arrangement [R. 122]; that Richfield Oil Corporation does not issue any passes to its vessels [R. 127]; that the policy of not issuing passes is for the purpose of better safeguarding the vessels, their crews and the surrounding property [R. 127]; that when you issue passes to one

organization, union trouble will result unless you issue them to all others [R. 129]; that this would increase the number of men on board the ship and increase the hazards on board ship [R. 129]; that the loading and discharging of petroleum products is a hazardous operation [R. 129]; that persons coming aboard would distract the loading officer [R. 129] and the men in their duties [R. 133]; that one going aboard would have an opportunity to commit sabotage or secure information valuable to the enemy, such as the nature of cargoes, convoy and escort vessel information, size and type of armament, etc. [R. 129-133]; that the company operates under the directions, rules and regulations of War Shipping Administration [R. 134]; that in his opinion the policy of refusing passes was in conformity with the Security Orders issued by the War Shipping Administration, because the fewer persons permitted aboard, the safer the ship [R. 135]; that no member of the War Shipping Administration has advised this witness that the Security Orders were or were not intended to refer to members of labor organizations [R. 145]; that Richfield Oil Corporation is required to abide by port regulations [R. 147] issued by the Coast Guard [R. 149]; that Richfield Oil Corporation's Marine Manager, Port Captain, Port Engineer and Port Steward, on occasion, board its vessels [R. 159]; that militarized guards are on guard at all times while in port [R. 160]; that vermin exterminators are permitted aboard when required [R. 160]; that in case of emergency, surveyors go aboard [R. 165]; that sometimes a laundryman is permitted to deliver crews' laundry [R. 161]; that when work is done on the vessel, the vessel is gas freed [R. 165] and made safe for repair operations; that when gas freed, there is no danger of explosion from the vessel's

cargo; that the repair work is performed in shipyards [R. 164, 169]; that no one, including the witness, is permitted aboard without proper identification [R. 169].

That the company policy concerning passes was communicated to this witness by his superior, Mr. P. C. Lamb, Manager of the Marine Department, and the witness has been informed by his superior that the corporation issue no passes because of safety reasons [R. 171].

Harry Lundberg, Secretary- Treasurer of the Sailors' Union of the Pacific, and President of Seafarers' International Union of North America [R. 176] since October, 1938 [R. 177], called as Board's witness, testified substantially as follows: That he has been a sailor all his life [R. 177]; that he negotiates contracts and appears before congressional committees and governmental authorities [R. 178]; that contracts negotiated with dry cargo vessels are negotiated through associations; that agreements with tankers are signed individually [R. 179]; that the "Statement of Policy" signed with the War Shipping Administration "froze" existing contracts for the duration of the war [R. 179, 325]; that in his opinion, grievances under contracts are every-day occurrences [R. 180]; that he has passes to 470 vessels on the Pacific Coast under agreements with various shipowners [R. 181]; that only Richfield Oil Corporation, General Petroleum Corporation and Standard Oil Company do not give them passes; that Associated Oil Company does give them passes under contract dated November 18, 1942 [R. 181]; that Hillcone Steamship Company granted passes in January, 1943 [R. 181]; that the shore delegate that boards vessels is called a patrolman [R. 182]; that witness was a patrolman for 9 months in Seattle [R. 183]; that when

he went aboard a vessel, he went to the ship's delegate who was a member of the crew to ascertain if there was any trouble [R. 183]; that if there was a dispute and it could not be settled on board, it was referred to the Port Committee [R. 184]; that he checked, himself, to see if complaints were legitimate and if not, nothing was done about them [R. 185]; that the shore delegate also collected dues; that the collection of dues by shore delegates or patrolmen is the most feasible method of collecting dues as it is important that the men keep their dues paid up to enjoy the benefits incident to membership [R. 185]; that the unions maintain offices in Honolulu, San Pedro, San Francisco, Portland, Seattle and Vancouver, B. C. [R. 186], and also at Point Richmond on San Francisco Bay [R. 187], and holds regular meetings each Monday night [R. 186]; that tanker personnel seldom attend meetings because they are in port only a limited time and have other things to do [R. 188]; that to adequately settle grievances, it is necessary for the union representative to go aboard ship and that he knows of no case yet when any steamship company handles them otherwise [R. 188]; that some companies often ask union representatives to come on board; that it was not possible to settle disputes except by going aboard ships because (1) the men wanted them settled on the ship before it leaves, (2) the necessity to check up on the dispute, and (3) if the man takes it up without the backing of the union delegate he will get fired [R. 190]; that the patrolman's qualifications require him to be a citizen and a *bona fide* seaman of three years' experience [R. 191]; that the patrolmen are trained by this witness in labor relations [R. 191]; that Board's Exhibit 2, rejected, is a contract with an association of some 20 steamship companies operating some 380 dry

cargo vessels [R. 257]; that this agreement contains no pass provisions [R. 255] but the companies issued passes, through verbal arrangement, which are valid until revoked [R. 259]; that when on board these vessels the witness has seen them loading all kinds of war materials and troops [R. 260]; that Board's Exhibit 3 is a contract with an association of dry cargo vessel operators, and contains a pass provision [R. 278]; that Board's Exhibit 4, a contract with the Tide Water Associated Oil Company, contains a pass provision [R. 290]; that the Hillcone Steamship Company granted passes in 1943 on a verbal arrangement; such passes are subject to revocation [R. 181-182]; that he and the patrolmen had Navy identification badges and Coast Guard identification cards [R. 328]; that in addition to these documents, it was necessary to have the shipowners' pass to board vessels [R. 329-330]; that Richfield Oil Corporation, General Petroleum Corporation and Standard Oil Company do not issue passes; that Richfield Oil Corporation, prior to January 15, 1942, did issue passes, for San Pedro only [R. 333].

That Board's Exhibit 7-B refers to weekly meetings previously held on board ship but discontinued when the Statement of Principles was agreed upon [R. 411]; that such meetings were against the policy of his union [R. 411].

William Gries, a seaman by trade and for the past nine months a union patrolman with headquarters at San Pedro, California [R. 365], called as a witness by the Board, testified substantially as follows: That he is an organizer for the complaining unions [R. 365]; that his office is 7 or 8 miles from Richfield's Long Beach dock [R. 366]; that he settles grievances and that one specific

instance involved the Waterman Steamship Company; that another instance involved the Alcoa Steamship Company [R. 367]; that in both instances, the company representative called him and asked him to come down and go aboard the vessels [R. 367]; that another instance involved the allocation of crews' quarters in which the War Shipping Administration, the Navy, or somebody, could not seem to get it straight and it was necessary for him to see that the men got the quarters to which they were entitled [R. 368]; that a patrolman does not necessarily wait until he is called before going on board [R. 369]; that sometimes he knows when a ship is coming in or is called generally by the company representative [R. 369]; that if a man with a dispute is on duty when the patrolman arrives, some other man is sent to relieve him [R. 370]; that he sometimes goes aboard just for the purpose of collecting dues and when aboard the men always have something to complain about [R. 371]; that he also distributes union trade papers [R. 371]; that he is generally on board a ship from one to two hours but if there is a dispute it might take longer [R. 372]; that one dispute he recalls involved Richfield Oil Corporation [R. 373]; that he settled about 90% of the grievances presented to him by going on board the vessels [R. 376]; that in October of 1942, the witness requested passes from Richfield and several times since then [R. 378]; that there were three meetings in November, three in December, and some in the first week in January, but that the company would not agree to issue passes subject to any stated conditions [R. 378-379]; on cross-examination the witness stated that he had the opportunity to, but did not solicit membership when on board ship [R. 379-380].

P. C. Lamb, Manager of the Marine Department of Richfield Oil Corporation, present at the request of the Trial Examiner, testified substantially as follows: That he issued orders abolishing passes to Captain Wilder [R. 383], who previously testified; that passes had not been issued by Richfield Oil Corporation since termination of the contract with the complaining unions [R. 384]; that he had instructed Captain Wilder that it was the company's policy not to issue passes to anyone [R. 385]; that the policy was formulated prior to Security Orders Nos. 1 and 2 of the War Shipping Administration [R. 386] and before the issuance of regulations by the Port Captain of the Los Angeles-Long Beach Harbor Area [R. 387]; that the policy was established primarily because of the war and the demands made by other unions [R. 388]; that repeatedly, representatives of unions with which Richfield did not have contracts had requested passes [R. 388-389]; that even in normal times the safety of the vessel is the important consideration and the primary objection to passes [R. 390]; that hazardous conditions are aggravated in wartime [R. 390]; that the presence of the union representatives on board is not more objectionable than others—the hazard depends on the time spent aboard the vessel [R. 390]; that the policy was adopted primarily upon the judgment of the company for the safety of the vessel and to reduce hazards [R. 390].

PART B.

Summary of Documentary Evidence Introduced.

During the course of the oral testimony a number of exhibits were introduced. A brief summary of these exhibits follows:

Board's Exhibit No. 1-A to 1-I, inclusive [R. 1-16].

These are the formal papers, including pleadings.

Board's Exhibit No. 2 (rejected) [R. 192-249].

This is the complaining unions' contract with certain dry cargo vessel operators, dated November 4, 1941. This agreement does not contain a pass provision. Grievance procedure is contained in Section 11 thereof [R. 196], and provides that port committees shall be set up with equal representation by the employer and the unions, to investigate and adjudicate all grievances and disputes and prevent violations of the contract. The committees shall meet within 24 hours upon request of either party. If the port committee fails to agree, the matter is referred to a referee whose decisions shall be final and binding. The detailed method of appointing the referee is contained in this section of the contract.

Board's Exhibit No. 3 [R. 262-283].

This is the complaining unions' contract with certain dry cargo vessel operators known as the Shipowners' Association of the Pacific Coast, dated October 27, 1941. Section 3 under "Conditions of Employment" provides [R. 278]:

> "3. Authorized representatives of the Union shall be allowed to visit members of the Union aboard ship at any time."

Detailed grievance procedure is set forth under section entitled "Port Committees and Labor Relations" [R. 280], and provides that port committees shall be set up with equal representation by an employer and the union. If a particular port committee is deadlocked, the matter is referred to the port committee at San Francisco and if an agreement is not reached within 48 hours the matter is referred to the Conciliation Service of the U. S. Department of Labor. If the Conciliation Service cannot bring about settlement within 48 hours, a referee shall be appointed by the Conciliation Service or by the Secretary of Labor and the decision of the referee shall be final and binding. The condition concerning which the dispute arose shall prevail until settlement is reached.

Board's Exhibit No. 4 [R. 285-323].

This is the complaining unions' contract with Tide Water Associated Oil Company dated November 18, 1942. Section 10, under "General Rules" [R. 290], reads as follows:

> "Section 10. Passes: Company shall distribute passes to authorized representatives of the Union who may board Company's vessels in ports for the purpose of transacting Union business. The Union agrees that it will comply with all rules and regulations at the place of entry. Such passes will be issued only while insurance satisfactory to the Company is held by the Union. The Union agrees that its representatives shall in no way interfere with or retard vessel operations. Any pass issued is subject to revocation."

Detailed grievance procedure is set forth under Sections 3 and 4 [R. 287]. Full text of the grievance procedure is set forth below for the reason that it is the grievance

procedure previously agreed upon by your petitioner and the complaining unions (prior to filing of charges) and it is the grievance procedure that will appear in the contract between these parties when the entire agreement is approved by the War Labor Board.

Grievance Procedure in Board's Exhibit No. 4 [R. 287-288].

"Section 3. Union Delegates Aboard Ship: Company agrees to recognize one employee designated by the Union on each vessel to act as a delegate and representative of the Union.

Section 4. Grievance Procedure: For the purpose of adjusting complaints and grievances any employee shall endeavor to adjust the matter either in person or through the Union delegate according to the following procedure:

a. The employee's complaint shall be presented to the Captain or his delegated representative. If a satisfactory adjustment is not reached immediate notification shall be given to the Captain or his delegated representative of intent to carry the grievance to the second step of the grievance procedure; then,

b. The complaint, in writing with full explanation and argument, shall be then presented to the Company's shore representative and representatives of the Union; if satisfaction shall not be had thereby within twenty-four hours after presentation; then

c. The matter shall be referred to an arbitration committee consisting of one member chosen by the Union, one member appointed by the Company and a third member selected by these two; then

d. If Union and Company representatives cannot agree on selection of a third member within twenty-four hours, the third member shall be selected by the presiding judge of the Ninth Circuit Court of Appeals. The decision of this committee shall be final and binding."

Board's Exhibit No. 5 [R. 335-338].

This is a letter dated January 18, 1943, addressed to the complaining unions, in answer to their letter dated January 7, 1943, setting forth your petitioner's reasons for not agreeing to a preferential hiring clause and a clause providing for passes. This letter, introduced by the Board, shows clearly that the employer had been negotiating with the complaining unions, had reached substantial agreement with the unions, and was willing to continue negotiations and to reduce the agreement to writing.

Board's Exhibit No. 6 [R. 355].

This is a letter dated January 6, 1943, from the Regional Director advising your petitioner of the filing of charges by the complaining unions (the answer to this letter is Respondent's Exhibit No. 6 [R. 358-364]) in which your petitioner described in detail its reasons for refusing to issue passes.

Board's Exhibit No. 7-A [R. 398-401].

This is the so-called "Statement of Policy" which the complaining unions contend "froze" existing contracts, and which your petitioner contends prevents meetings on board ship against the operator's wishes.

Board's Exhibit No. 7-B [R. 402-403].

This is an interpretation by the War Shipping Administration of the provisions in the Statement of Policy concerning meetings held on board ship.

Board's Exhibit 8 [R. 407].

This is a photostatic copy of Mr. Lundeberg's Coast Guard identification card.

Board's Exhibit No. 9 [R. 410].

This is a photostatic copy of Mr. Lundeberg's "pass" issued by the U. S. Navy.

Respondent's Exhibit No. 1 [R. 137-138].

This is the WSA's Security Order No. 1 issued to your petitioner, as one of the War Shipping Administration's agents, directing full compliance with Security Orders and requiring immediate improvement in the methods of handling information concerning vessel movements, etc.

Respondent's Exhibit No. 2 [R. 138-144].

This is the War Shipping Administration's Security Order No. 2 issued by the WSA to your petitioner as one of its agents giving instructions concerning the security of vessels including the following:

> "10. Visitors. Visitors to piers and vessels should be limited to cases of absolute necessity."

Respondent's Exhibit No. 3 [R. 152].

This is an excerpt from war regulations for tank vessels in the Los Angeles-Long Beach Sea Area (issued by the U. S. Coast Guard), which reads, in part, as follows:

> "7. No person shall be admitted to a tankship except upon establishing a reasonable necessity therefor. * * *"
>
> "11. An identification is not a pass or license to go on board. Anyone whose presence on board the vessel or the dock appears inimical to the war effort, shall be excluded from the premises, despite possession of valid identification."

Respondent's Exhibit No. 4 [R. 156].

This is an excerpt from war regulations for the protection of waterfront petroleum terminals—Los Angeles-Long Beach Harbors (issued by the U. S. Coast Guard). These regulations in part require that owners or operators of waterfront oil terminals shall safeguard their premises and that the regulations are issued to, among other things,—

> "(a) Prevent access of persons to the terminals who do not exhibit the authorized credentials and who do not have necessity for entering."

Respondent's Exhibit Nos. 5-A to 5-E, inclusive [R. 344-354].

This is an exchange of correspondence between your petitioner and the Regional Director of the Board, in 1942, concerning a charge by the National Maritime Union that your petitioner refused to issue passes to that union. Upon a showing by your petitioner that it did not discriminate concerning passes but refused them to all persons alike, the Regional Director refused to issue a complaint and the Board upheld his decision. [See Exhibit 5-A, R. 344.]

Respondent's Exhibit No. 6 [R. 358].

This exhibit has been referred to in connection with Board's Exhibit No. 6. It sets forth your petitioner's reasons for refusing to issue passes and refers the Board to its decision in a similar charge filed by the National Maritime Union. [See Respondent's Exhibits 5-A to 5-E, inclusive.]

PART C.

The Board's order directs your petitioner to:

"1. Cease and desist from:

(a) Refusing to grant passes to representatives of the Sailors Union of the Pacific, a division of Seafarers' International Union of North America, and Seafarers' International Engine Division, a division of Seafarers' International Union of North America, in order that such representatives may go aboard the respondent's vessels for the purposes of collective bargaining, for the discussion and presentation of grievances, and for other mutual aid and protection of the employees represented by these Unions, including the collection of dues and distribution of trade papers to union members, provided, however, that the respondent is not required to issue passes for the solicitation of membership;

(b) Engaging in like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Grant passes to the duly authorized representatives of the Sailors Union of the Pacific, a division of Seafarers'

International Union of North America, and Seafarers' International Engine Division, a division of Seafarers' International Union of North America, to go aboard its vessels for the purposes of collective bargaining, for the discussion and presentation of grievances, and for other mutual aid and protection of the employees represented by the Unions, including the collection of dues and distribution of trade papers to union members, provided, however, that the respondent is not required to issue passes for the solicitation of membership;

(b) Post immediately in conspicuous places on its vessels, for a period of at least sixty (60) consecutive days from the date of posting, notices to the unlicensed deck and engine personnel, stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b); (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) hereof;

(c) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith."

PART D.

National Labor Relations Act.

WAGNER-CONNERY LABOR ACT

Act of July 5, 1935, c. 372, 49 Stat. 449. U. S. Code, Title 29, Sections 151-166.

(14,061)

An Act

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

* * * * * * * * *

Sec. 7. *Rights of Employees.* Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. *Unfair labor practices.* It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to

rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industry Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Sec. 9(a) *Representatives and elections.* Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay,

wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * * * * * *

Sec. 10. *Prevention of unfair labor practices.* (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuancy of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are on vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein

such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if

any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

* * * * * * * * *